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IN THE

Supreme Court of the United States

OCTOBER TERM 1982

HOMER N. COMEAU, ET. UX.,
Petitioners,

v.

CITY OF BROOKSIDE VILLAGE, ET AL.,
Respondents.

Petition for a Writ of Certiorari to the Supreme Court of Texas

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BRIEF AMICI CURIAE OF THE NATIONAL MANUFACTURED HOUSING FEDERAL AND THE TEXAS MANUFACTURED HOUSING ASSOCIATION IN SUPPORT OF THE PETITION FOR CERTIORARI

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QUESTION PRESENTED

Consistent with the Fourteenth Amendment may a community adopt as its exclusive zoning ordinance a prohibition on manufactured housing except when located in mobile home parks?

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INTEREST OF AMICI CURIAE

The National Manufactured Housing Federation, 1745 Jefferson Davis Highway, Arlington, Virginia 22202, is a non-profit national trade association whose membership is composed of 37 state and regional trade associations representing and providing services for the manufactured

housing industry in such states. These state trade associations variously represent all segments of the manufactured housing industry with a combined individual membership total of approximately 30,000 business firms.

The Texas Manufactured Housing Association is a statewide membership supported trade association with approximately 1,200 business members. TMHA members represent all segments of the manufactured housing industry including manufacturers, financial institutions, insurance companies, retailers, suppliers, and manufactured housing brokers, subdivision developers and park owners. THMA filed a brief amicus curiae in the Texas Supreme Court in the instant case and its President testified at trial as an expert witness.

ARGUMENT

Even the most casual television viewer is now familiar with the plight of the would-be home owner in the United States as the network news each month reports the average cost of new housing as well as the interest rate on conventional mortgages. Although the stories seldom attempt any depth, the message comes through pretty well: it takes a lot more money than most Americans ever will have to get into the housing market.

The picture is indeed stark. The average price of a new single family home in 1980 was $76,300. "Homeseekers are being priced out of the market in larger and larger numbers. While in 1970 almost half of all American families could afford the median priced, single-family new home, today less than one-quarter can." HUD, The Affordable Community: Growth, Change, and Choice in the 80s, 8 (July 1981). This cannot sit well in a society where home ownership has been justly prized as an important aspect of our lives. From the earliest days of our nation, individuals have wanted land and a home to call their own. Not only have we succeeded in providing this,

but over "much of the past four decades, the nation has made steady and substantial progress toward the goal of adequate shelter for all Americans . . . . Today, the American dream of owning one's own home is a reality for two of every three households, compared with fewer than half in 1940." The Report of the President's Commission on Housing 59 (1982).

Households are formed by young adults under the age of 35, and as we all know the postwar baby boom has created a huge cohort at that age group. A study prepared for the President's Commission on Housing by the Joint Center for Urban Studies of Harvard and MIT concluded that the rate of housing formation will remain high throughout the 1980s. Yet "[a]s a result of inflation and high interest rates, home ownership has become increasingly difficult to achieve for those who are not already owners. First-time homebuyers face large downpayments and high monthly cash costs. . . ." The Report of the President's Commission on Housing 59. Indeed, carrying costs on new homes have soared to over 60% of monthly income. *Id.* at xxv [Table].

As the President's Commission and others have noted, manufactured housing[1] has become "a significant source of affordable housing for American families, particularly first-time homebuyers, the elderly, and low- and moderate-income families." *Id.* at 85. In 1980, 29% of all single-family homes sold in the United States were manufactured homes (*id.* at 203); a year later, this had increased to 36%. The vast majority of these homes were sold for under $50,000. *Id.* at 85. If home ownership is to become a reality for the millions of households to be formed during this decade, manufactured housing will become increasingly important in the housing market.

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[1] The term "mobile home" was changed to "manufactured home" by P.L. 96-399, 94 Stat. 1641 (1980), 42 U.S.C.A. §§ 5401 *et seq.*

It is here that need collides with reality. After noting that affordable manufactured housing provides an important means of providing adequate housing for Americans, the HUD study notes:

> Images of 'trailor camps' and 'aluminum ghettos' are often raised to keep factory-built housing out of 'good' neighborhoods. The trailor camp image does not take into account the great improvements made by the manufactured housing industry in the past decades. Housing coming off assembly lines compares favorably in looks, livability, and durability with conventional housing. When these units are sensitively sited and landscaped, little but price distinguishes them from other housing. Almost all local and state regulations, however, discriminate against manufactured housing.[2] These discriminatory policies cause communities to ignore and forego a promising opportunity to narrow the gap between the supply and demand of affordable housing.

HUD, The Affordable Community 56. So, too, The Report of the President's Commission on Housing recognizes the discrimination against manufactured housing based on the outmoded stereotypes of decades passed by (at 203). Yet as the President's Commission notes, not only do those living in a community have a stake in how property is regulated, in our mobile society all citizens, including those who wish to move into a community, have "a stake in the opportunity to move in and out of communities without artificial restrictions." *Id.* at 178.

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[2] See also Note, *Toward an Equitable and Workable Program of Mobile Home Taxation*, 71 Yale L.J. 701, 702 (1962): "Community fear of blight can traced to the low quality of both the early trailers and their parking facilities . . . [The early structures had] no construction standards to insure even minimum protection against fire or collapse . . . [Mobile home] parks seldom exceeded minimum health and sanitation standards. The specter of such parks teeming with tiny trailers made community apprehension understandable."

The instant case provides a snapshot of the national problem. But there are significant differences. The most important facet of this case is that Brookside Village has *no* comprehensive zoning plan. The exclusive land use control in this small Texas community is the prohibition under challenge that manufactured homes must be exclusively located in "mobile home parks". Thus this case does not present any issues relating to a requirement that municipalities fine-tune their zoning ordinances as national needs change. Instead, it presents the pure legal issue of whether a city may single out manufactured housing—and manufactured housing alone—for zoning restrictions.

As difficult as it is to conceive, any property owner in Brookside Village may construct, on site, *any* type of building so long as it meets safety standards. The building may be large; it may be small. It may be an aesthetic beauty; it may be a monstrosity. It may be a mansion; it may be a shack. It can even be a commercial establishment or a large tasteless apartment complex. The City of Brookside Village does not care. It can be on the smallest lot in the city; it can be on a multi-acre tract. Anything can be built on site. But if the building is manufactured to be secured on a permanent foundation, then Brookside Village cares. It prohibits this; manufactured housing cannot be used as a single-family residence. It must be located, along with other manufactured housing in a "mobile home park". This is so no matter how safe it is, how large it is, how attractive it is. Brookside Village does not care about much, but when it cares, it cares a lot.

If a real property owner in Brookside Village wishes to live in manufactured housing, the city offers him three and only three choices: (1) he may leave Brookside Village and live elsewhere; (2) he may stay in Brookside Village, open his property as a "mobile home park", comply with all the requirements surrounding a "mobile home

park" in Brookside Ordinance No. 58[3] and become a landlord, or (3) he may leave his property and rent from another, with others, in a "mobile home park".

Like most other Americans, Homer and Hazel Comeau wanted to be neither landlords nor tenants. They simply wanted to live in a home on their own property. In July of 1978 the Comeaus petitioned Brookside Village to be allowed to place a manufactured home on their property. In August, the city refused the request. About a month later the Comeaus moved a manufactured home onto their four acres of property. The home in question consists of 3 bedrooms and 2 bathrooms and has 1780 square feet. Thus it is 80 square feet larger than the average single-family dwelling constructed in 1978. See Report of the President's Commission on Housing 71. Like the average home, the Comeaus meet all construction, building and safety standards applicable. Furthermore, again like the average home, it is affixed to a permanent foundation. What is different from the average home is that the Comeaus' cost only $35,000.

This litigation then ensued. The Comeaus attacked Brookside's Ordinance 58 (as amended by Ordinance 78) as violative of the Equal Protection and Due Process Clauses of both the State and Federal Constitutions.[4] The city responded that the ordinances were valid because of potential water and sewage problems, and that manufactured homes are vulnerable to wind and fire damage, and may decrease property values in a community. Brook-

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[3] Ordinance No. 58 consists of 22 legal-sized, single-spaced typed pages of regulations of "mobile home parks". Ordinance 78, an amendment to Ordinance 58, prohibits locating a mobile home as a residence outside the confines of a "mobile home park." Ordinance 78 is reproduced as Appendix A *infra*.

[4] See Count VI of the Plaintiff's Original Petition, reproduced as Appendix B *infra*.

side Vilage prevailed at trial, lost in the Court of Civil Appeals, and then prevailed again in the Texas Supreme Court. The due process argument was rejected because municipalities have historically had the power to deal with problems caused by mobile homes[5] and the rationales offered by the city were "not clearly arbitrary and unreasonable". The equal protection argument was rejected "[b]ecause all mobile home owners, desiring to use their structures as residences, are treated alike".

Unlike some academics who have pronounced the Equal Protection Clause a dead letter, the Texas Supreme Court would inter the clause by tautological reasoning. Unlike both, we believe the Equal Protection Clause continues to exist and properly places some outer limit on the ability of state and local governments to classify identical things differently. We also believe that the Texas Supreme Court erred when it concluded that arbitrary laws still satisfy the requirement of due process and do so until they become "clearly arbitrary". Although we believe that the ordinances transgress even the "clearly arbitrary" standard articulated below, it is our contention that the ordinances' requirement that owners of real property desiring to live in manufactured housing must either leave Brookside Village or become landlords or tenants is so arbitrary that it runs afoul of even *de minimis* rationality which is less than *Village of Euclid* v. *Ambler Realty*, 272 U.S. 365 (1926) requires. Furthermore, once Brookside Village begins to articulate the rationale for the ordinances, their underinclusiveness becomes so dominating and their true purpose so patent, that they deny equal protection.

The principal justification for the city's action has been the water and sewage problem. The Court of Civil

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[5] The Texas Supreme Court and Brookside Village have studiously avoided the term "manufactured housing". Contrast the Federal Government, footnote 1 *supra*.

Appeals easily exploded this justification by pointing out that the water problems caused by the Comeaus' manufactured home are no different whatsoever than those that would be caused by legal on-site construction. Although the city again pressed its water and sewage argument to the Supreme Court, that court simply noted the argument was made, and then steered clear of it in the opinion.

The next asserted justification for the ordinances are fire and wind safety considerations. The Comeaus offered expert testimony that manufactured homes, such as theirs, constructed after, and in compliance with, the National Manufactured Housing Construction and Safety Standards Act of 1974, 41 U.S.C.A. §§ 5401 *et seq.* (Supp. 1982) were just as safe as conventional on-site housing. The undisputed evidence was that mobile homes constructed according to the HUD code since June 15, 1976 are required to be securely anchored to withstand gale or hurricane-force wind velocity for the particular geographic location of the home. The city also offered no evidence to counter the findings of the National Fire Protection Association that there is no difference in the incidence or extent of loss between HUD code manufactured homes and site-built residences.

The Texas Supreme Court appears to have relied on the fire and wind rationale for the ordinances, although the treatment of this issue is sparse and ambiguous. Without adverting to any evidence, the court says manufactured housing is "vulnerable to windstorm and fire damage". That is true, but does not distinguish manufactured housing from on-site housing which is also vulnerable to fire and wind. It is possible that the court means "more" vulnerable, although if this is its meaning, it flies in the face of the undisputed evidence and raises the expertness of five aldermen in a small Texas community to a level which is unchallengeable even by people who have the relevant facts. To the extent the

court is holding that a municipality has a complete right to enforce its ordinances affecting the use of real property in the face of clear evidence that the asserted justifications do not exist, the decision, as well as the ordinances, denies individuals the use of their property without due process of law.

Another—and related—reading of this two paragraph treatment of the fire and wind rationale is that the court agreed with the Comeaus but did not believe that there was any obligation on the city to change its dated approach. Although the facts might lead a city to update its approach, "the fact remains that a large number of mobile homes, manufactured prior to the 1976 construction and safety standards acts, exist". This implies that the municipality may discriminate against post-1976 homes for which there are no differences with site-built homes because there are differences between site-built homes and some pre-1976 manufactured homes. This stands as an admission that there is no relevant distinction between the Comeaus' manufactured home and a site-built home, but that the city is free adversely to regulate the former anyway.

The final rationale offered and accepted by the Texas Supreme Court is that the "mobile nature [of the homes] may lead to transience and detrimentally impact property values if scattered throughout a community". The Comeaus' house, which is affixed to a permanent foundation, is no more "mobile" than a site-built house. True, it could be unaffixed. But we have all seen site-built houses unaffixed. And the moving costs for each are high and similar. Transience applies to the mobile home of decades past, not the manufactured homes of today.[6]

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[6] Possibly with an exception. Brookside Village may be creating a self-fulfilling prophesy. By refusing to allow manufactured homes on owner-controlled real property, the city created an underclass of tenants subject to a landlord's domination. This may force mobility on the tenants.

The property value argument might have validity in some contexts. But not in Brookside Village. Once again it is necessary to recall the counter-intuitive fact that Brookside Village has no general zoning. The city does not like manufactured homes, but it does not care about anything else. A shack, a commercial establishment, a tacky apartment complex can be constructed with impunity in Brookside Village. Each can lower property values and the city does not care. It stretches credulity to suggest that only manufactured housing is capable of lowering property values sufficiently in Brookside Village that it, alone, merits attention.

In *Moore v. East Cleveland*, 431 U.S. 494 (1978) this Court invalidated an effort by middle class blacks to isolate their community from the matrifocal structure of ghetto black families. Although unconstitutional, the prejudice behind the ordinance was at least comprehensible. Here, by contrast, the ordinances at issue reflect prejudice without purpose. Creating a mobile home ghetto made sense thirty years ago when mobile homes were small, poorly constructed eye-sores. But Brookside Village cannot even make a land use argument since the creating of "mobile home parks" in Brookside Village is the sole zoning ordinance. And it is the failure of generality that brings the facts into context. Brookside Village is not even marginally underinclusive in its concerns. The city asserted a water problem, but a manufactured home such as Comeaus' presents no water problem different from a site-built home. And if one were to take the city's argument at face value—as the Court of Civil Appeals did to the city's dismay—then congregating manufactured houses in a park, which the Comeaus could do on their property, exacerbates the water problem. So another rationale was needed. Manufactured homes are just not safe enough, the city announces. Unfortunately post-1976 manufactured housing is. So the city is left with contending that it need not take these newer facts into consideration. It can con-

clusively presume all manufactured housing is less safe because it knows that some older mobile homes are not as safe as site-built homes. This relieves the city of any obligation to explain why two homes identical in every aspect except place of construction may be treated differently. Finally, there is the argument that manufactured housing depresses property values. Again, this might have validity were there some indication that Brookside Village had any concern with property values. But its lack of a zoning ordinance hardly speaks for preserving property values, and the ability of the Comeaus, should they desire, to become landlords of a "mobile home park" on their four acres belies the city's argument. In the end, the requirement that people with manufactured homes should either leave Brookside Village or congregate together in parks has no legitimate rationale and its real purpose is manifest. The city fathers learned in their youth that mobile homes were bad and they see no need to correct this judgment just because the facts have changed. The mayor's testimony that he would burn any manufactured home located on land adjoining his[7] sums it up: good people don't live in manufactured housing, and accordingly, people who do live in manufactured housing may be denied the enjoyments of home-owning on their own land.

The underinclusiveness is so extreme and the justifications so baseless that the ordinance denies equal protection even under the most minimal standard. But more fundamentally, the arbitrariness of Brookside Village's treatment of landowners wishing to affix a manufactured home to a permanent foundation on their own property for their own use denies them due process of law.

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[7] The Mayor's testimony on this point is reproduced as Appendix C *infra*.

CONCLUSION

The petition for certiorari in the instant case reflects the justifiable anger of an owner of real property who is told he must either leave or become a landlord or a tenant. The petition fairly rings with a clarion call for this Court to move into a new area and make a lot of new law. In that respect it is not overly helpful. The instant case provides an opportunity to examine a single egregious use of a not untypical form of exclusionary zoning as it relates to the growing national problem of how we are to house the post-war baby boom generation. Because the City of Brookside Village has but a single zoning ordinance, the case presents a pure legal issue and is a superior vehicle for appellate review. Furthermore, unlike the applications in the petition, settled doctrines of equal protection and due process can be applied to these facts for decision. One need not scour Professor Tribe's Treatise; reading again *Village of Euclid v. Ambler Realty* will suffice nicely. What is at stake is simple *de minimis* rationality: may a municipality have a single zoning ordinance that creates a closed class sustained by the sole purpose of venting the prejudices of years gone by? It comports better with our concept of liberty to think the answer is no, and the writ of certiorari should be granted to reaffirm an old verity in a newer context.

Respectfully submitted,

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APPENDICES

APPENDIX A

ORDINANCE NO. 78

AN ORDINANCE AMENDING ORDINANCE NO. 58; REGULATING THE PARKING OF MOBILE HOMES; REGULATING THE CHANGE OR REPLACEMENT OF MOBILE HOMES; PROVIDING FOR EMERGENCY USE OF MOBILE HOMES; REQUIRING PERMITS FOR SUCH EMERGENCY USE; PROVIDING FOR A PENALTY FOR VIOLATION HEREOF; AND PROVIDING FOR AN EFFECTIVE DATE HEREOF.

BE IT ORDAINED by the Board of Aldermen of Brookside Village, Texas;

Section I. Subsections B and C of Section XVIII of Ordinance No. 58 is hereby deleted in its entirety, and is hereby amended to include the following provisions as set out herein.

Section II. Parking of mobile homes, camper buses, motor homes and camper trailers, for use as a residence, outside of a mobile home park shall be prohibited.

Section III. Mobile homes heretofore installed in compliance with the Ordinances of Brookside Village may remain in place, and continue to be used or occupied. Exchange, replacement, alteration, relocation or additions to mobile homes within Brookside Village is hereby prohibited, unless such move, replacement, alteration, relocation or addition is to or in a licensed mobile home park.

Section IV. The Board of Aldermen of Brookside Village, by a majority vote of its five (5) members, may grant to individuals the temporary use of mobile home, motor homes, camper busses, or camper trailers in the event of an emergency. An emergency shall only be loss of a permanent dwelling due to fire, flood or any other natural disaster. In the event any such application for

emergency temporary use of said mobile homes, motor homes, camper buses or camper trailers is granted by the Board of Aldermen, no such temporary use shall begin until:

A. A permit fee, to be established by the Board of Aldermen, is paid by the applicant.

B. A determination of the period of time such emergency use may continue, but in no event shall such period exceed thirty (30) days. However, each applicant may have his emergency permit extended for additional thirty (30) day periods. No permit shall be extended, or renewed, more than five (5) times. All such extensions shall require a majority vote of the five (5) member Board of Aldermen.

C. The Board of Aldermen shall only grant an emergency permit for the express purpose of occupying a mobile home, motor home, camper bus or camper trailer as a residence, only while repairing, remodeling or replacing a permanent residence.

D. Any such emergency permit granted shall require the applicant to locate his temporary mobile home, motor home, camper bus or camper trailer upon the same lot, or parcel of real estate, as the permanent residence that is being repaired, remodeled or replaced.

Section VI. An existing mobile home, that is destroyed by fire, explosion, flood, or other natural disaster, may be replaced, if such replacement is of the same size, length, width and weight as the one destroyed.

Section V. This Ordinance shall become effective from and after the date of its passage, and after all applicable laws of the State of Texas, if any, have been complied with.

Section VI. Any person violating this Ordinance is guilty of a misdemeanor, and upon conviction shall be fined not less than Ten Dollars ($10.00) and not more than One Hundred Dollars ($100.00). Each day a violation of this Ordinance continues shall be a separate offense.

Passed and approved this 18 day of April, 1974.

[The error in section numbering is in the original ordinance.]

APPENDIX B

Count VI of Plaintiff's Original Petition for Temporary Restraining Order, Temporary Injunction and Other Relief:

All provisions of said Ordinances, as they relate to the placement of a manufactured home on Plaintiffs' property, are unconstitutional as applied to Plaintiffs' above described property, in that it arbitrarily and capriciously attempts to dictate the use to which Plaintiffs can place on their land as a home. The Federal and State governments have, as set forth hereinabove, pre-empted the health, safety and welfare with regard to regulation of the construction and installation of the mobile homes. Said restricting provisions of said Ordinances, and enforcement of said Ordinance by the officers and agents of said City of Brookside Village is a void and unconstitutional use of the police powers given it by the United States Constitution and the State of Texas Constitution in that it cannot be shown that the public health, safety, moral or welfare of the citizens of this City or State can be furthered by the enforcement of this Ordinance. As such, the action of the City violates the Equal Protection and Due Process clauses of both State and Federal Constitutions.

APPENDIX C

Testimony of the Mayor of Brookside Village on the Comeaus' Home Taken from the Statement of Facts [Trial Transcript] at 42-43:

Q. So it's possible that he [Comeau] could have five or ten mobile homes at that site, and being inside the ordinance there wouldn't be any problem, correct?

A. Yes, if the permit was issued by the council for a mobile home park.

Q. But at present he couldn't place his one mobile home on there and under the same requirements that are made for on-site houses use that as his residence, could he?

A. That's correct. He can't use a mobile home for a residence.

Q. A couple of more things. Mr. Boehm, you were quoted in the paper as saying that the ordinance is meant to keep mobile homes, which the town regards as fire traps and health dangers because of inadequate sewage, from being set up near conventional homes. Is that basically the way you feel about it?

A. I don't remember the exact statement but I'd say basically.

Q. Just to verify that you said this, also from the City of Brookside paper . . .

A. No, sir, it was not the City of Brookside paper.

Q. Pearland?

A. Yeah, it was probably in the *Journal* or in *The News* from Friendswood.

Q. (Reading:)

> "Boehm said that he thinks Comeau's home is nice looking, but he's concerned about the damage to the ordinance that would be done if Comeau were permitted to keep the home. 'If they try to move a

mobile home next to my house,' Boehm said, 'well they'd better not because I'll burn it down and you can quote me on that.' "

Is that a fair statement?

A. Pretty fair.